No. 14-1375

Supreme Court, U.S.
FILED
MAR 10 2016
OFFICE OF THE CLERK

IN THE
Supreme Court of the United States

CRST VAN EXPEDITED, INC.,
Petitioner,

v.

EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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REPLY BRIEF FOR PETITIONER

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March 10, 2016

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INTRODUCTION

1. Completely abandoning the position it took when opposing certiorari in this case, the EEOC has now disavowed the Eighth Circuit's rule requiring that a case be resolved "on the merits" as a precondition for a fee award to a prevailing defendant. Resp. Br. 29 & n.11. The EEOC now accepts that dispositions on plainly non-merits grounds—such as mootness or a time bar—can support fee awards to prevailing defendants. *Id.* at 28. As CRST argued in its opening brief, that position is correct. The Eighth Circuit's restriction of fee awards only to defendants who prevail "on the merits" has no basis in Section 706(k), conflicts with this Court's decision in *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412 (1978), and undermines the statutory policy underlying fee awards. Accordingly, this Court should abrogate the Eighth Circuit's rule. As the EEOC now agrees, this rule—which formed the basis of both the decision below and the petition for certiorari—is wrong.

2. Because it now agrees that the Eighth Circuit's rule is indefensible, the EEOC's attack on the fee award in this case hinges instead on its entirely new claim that only *preclusive* judgments in favor of defendants support "prevailing party" status, and that the judgment in this case did not preclude further litigation of the 67 claims at issue. This is a truly stunning about-face. In its brief in opposition, the EEOC made *no* argument about the threshold prevailing-party requirement. *See* Pet. Br. 27 (highlighting this omission). Now it rests its case almost entirely on a *new* argument about that requirement. Because the

EEOC has not so much as mentioned its newfound principal position in six years of litigation—and indeed has numerous times contradicted it—it has unquestionably waived this argument, and the Court should not entertain it.

3. If the Court does reach the argument, however, it will find that the EEOC is wrong on both the facts and the law. Despite the EEOC's revisionist history, the record conclusively demonstrates that the district court dismissed the 67 claims at issue here with prejudice and that all parties understood the court to have done so. Such a dismissal was entirely proper given the court's conclusion—affirmed by the Eighth Circuit—that the EEOC had "abdicated" its statutory responsibility to confirm that it had valid claims before forcing CRST to spend millions of dollars defending them. The EEOC now quibbles about the language of the dismissal order and judgment, but it made no argument at the time that the dismissal should be "without prejudice." And when all claims were resolved after the first remand from the Eighth Circuit, the EEOC filed a joint motion with CRST to dismiss "this action" *with prejudice*. In any event, it is hardly as "obvious[]" as the EEOC claims that only a dismissal with prejudice can support prevailing-party status. Resp. Br. 27.

4. Because the district court's judgment in this case rendered CRST a prevailing party under any appropriate standard—and because the parties now agree that a victory "on the merits" is not required for a fee award—all that remains is the EEOC's argument that its conduct did not meet the *Christiansburg* standard. The district court, which managed this case for several

years, disagreed and found that the EEOC acted unreasonably in seeking to litigate dozens of separate and unrelated claims without first investigating them, finding reasonable cause, and attempting conciliation. That carefully considered ruling is not an abuse of the district court's discretion.

ARGUMENT

I. As The EEOC Now Concedes, The Eighth Circuit's Rule Restricting Fee Awards Only To Defendants Who Prevail "On The Merits" Is Wrong.

The central question raised in the petition for certiorari was whether the Eighth Circuit erred in holding that CRST was ineligible for attorney's fees because the claims at issue were not resolved "on the merits." Pet. 4. The Eighth Circuit's rule is misguided for all the reasons set forth in Petitioner's opening brief. Pet. Br. 26-41. It has no basis in Section 706(k), which authorizes the award of attorney's fees to *any* "prevailing party" and "entrust[s] the effectuation of the statutory policy to the discretion of the district courts." *Christiansburg*, 434 U.S. at 416. It conflicts with this Court's decision in *Christiansburg*, which authorized the award of fees to a defendant if the plaintiff lacked "reasonable ground[s] for bringing suit." *Id.* at 422. And it is inconsistent with the statutory objectives, which include "protect[ing] defendants from burdensome litigation having no legal or factual basis." *Id.* at 420.

There is no need to dwell on these points, however, because the EEOC no longer disputes them. Despite

its prior embrace of the Eighth Circuit's rule, *see* Brief in Opposition 9-11, the EEOC now accepts that the barrier the Eighth Circuit has raised to defendant fee awards is "inconsistent with" this Court's decisions. Resp. Br. 29 n.11; *see id.* at 36. The EEOC's disavowal of the Eighth Circuit's rule is underscored by its approval of the various "decisions awarding fees based on non-merits grounds" collected in CRST's opening brief. *Id.* at 28. These include the very grounds that the decision below identified as impermissible bases for a fee award in the Eighth Circuit. *Compare* Pet. Br. 33-34, *with* Pet. App. 18a.

Accordingly, there is no longer any disagreement between the parties with respect to the central issue raised in the petition for certiorari. Because the Eighth Circuit's restriction on the range of cases in which a defendant may obtain a fee award is inconsistent with this Court's cases and frustrates the policy of Section 706(k), it should be overruled.[1]

II. The EEOC Has Waived Its Newfound Principal Argument.

Having jettisoned the rule that formed the basis for its victory below, the EEOC has invented an entirely new theory to attack the award of fees in this case. It now says (1) that a defendant "prevails" only if it secures a dismissal that precludes a future lawsuit based on the same claim, and (2) that the district court's judgment in this case did not have that effect.

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[1] If, however, the Court were to adopt the Eighth Circuit's rule, the dismissal in this case should qualify as "merits-related" for the reasons set forth in Petitioner's opening brief. Pet. Br. 41-56.

As explained below, the major premise is dubious at best, and the minor premise is clearly incorrect. *See infra* Part III. But the Court should not even entertain these contentions, because they have been waived several times over. Absent "exceptional circumstances," this Court will not "review[] a claim that was waived below." *United States v. Alvarez-Sanchez*, 511 U.S. 350, 360 n.5 (1994); *see* Stephen M. Shapiro et al., *Supreme Court Practice* 466-67 (10th ed. 2013) (collecting cases). There are no exceptional circumstances here, and the EEOC does not suggest any in its brief. Accordingly, it would be inappropriate to consider the EEOC's new attack on the fee award in this case at this late stage. The record conclusively shows that the EEOC waived this argument.

1. The EEOC did not contest that CRST was a "prevailing party" when, six years ago, the district court first awarded the fees at issue here. *See* JA 123a; Docket entry 295. Nor did the EEOC dispute that issue when it first appealed the fee award to the Eighth Circuit. *See* EEOC C.A. Br., 10-1682, at 92-96. In that appeal, the court affirmed the dismissal of the 67 claims, reversed two of the district court's grants of summary judgment, vacated the fee award without prejudice as a result, and remanded the case to the district court. Pet. App. 156a.

After the EEOC withdrew one of the two remaining claims, and the parties settled the other, CRST moved to reinstate the fee award as to the other 67 claims, arguing:

> CRST was the prevailing party when this Court first awarded fees because all EEOC claims had

> been dismissed with prejudice. After appeal, remand, and entry of final judgment, CRST remains the prevailing party as to all EEOC claims except one [settled] claim on behalf of Ms. Starke.

Docket entry 386-1, at 12. The EEOC did not dispute that its claims had been dismissed with prejudice, and it did not argue that such a dismissal was required for a fee award. Rather, the EEOC compared itself to the plaintiff in *Marquart v. Lodge 837, Int'l Ass'n of Machinists*, 26 F.3d 842 (8th Cir. 1994), whose complaint, it noted, was dismissed "with prejudice." Docket entry 391, at 7. "Like the *Marquart* defendant," the EEOC argued, CRST was ineligible for fees because it had not obtained a ruling that the plaintiff's discrimination claim "lacks any merit." *Id.* The district court rejected the EEOC's argument and reinstated the fee award to CRST.

2. The EEOC again appealed to the Eighth Circuit. And, again, it did not argue that CRST was not a prevailing party because it had not secured a dismissal with prejudice. Rather, the EEOC renewed its contention that the district court's "ruling does not constitute the type of merits-related decision that this Court held, in *Marquart*, is necessary." EEOC C.A. Br., 13-3159, at 50. In response, CRST argued that the pre-suit requirements *do* go to the merits of the EEOC's claim. As evidence for that proposition, CRST noted that "dismissal *with prejudice* is appropriate, as the district court and this Court held here, if EEOC has not satisfied its statutory pre-suit obligations, the defendant has been prejudiced as a result, and that prejudice cannot

be cured except through dismissal." CRST C.A. Br. 47-48 (emphasis in original). In its reply, the EEOC once again declined to contest that characterization of the dismissal in this case. Nor did it argue that a dismissal with prejudice was required for a fee award. The Eighth Circuit then reversed the fee award based on the *Marquart* rule. Pet. App. 18a-24a.

3. CRST petitioned for certiorari, asking this Court to resolve the split between the Eighth Circuit's rule permitting fees only to defendants who prevail "on the merits" and the rules of several other circuits, which permit fee awards on a number of non-merits grounds. *See* Pet. 14-17. The EEOC's brief in opposition did not make *any* argument about the "prevailing party" requirement, much less a claim that CRST could not meet this requirement because it did not obtain a dismissal with prejudice. Rather, the EEOC simply defended the Eighth Circuit's rule, which it cast not as an interpretation of the "prevailing party" requirement, but as a prerequisite for finding unreasonableness under *Christiansburg*. *See* Brief in Opposition 8, 10.

Petitioner is unaware of any case in which this Court has considered an argument that was so thoroughly and repeatedly waived. It would be enough that the EEOC did not argue this theory in the court below—or, for that matter, in its brief in opposition, *see Alabama v. Shelton*, 535 U.S. 654, 660 n.3 (2002). But, in fact, the EEOC *could* not have raised this issue in the underlying appeal in this case for two reasons. First, the argument was not raised in the district court, and the Eighth Circuit ordinarily "decline[s] to consider

[an] argument for the first time on appeal." *von Kerssenbrock-Praschma v. Saunders*, 121 F.3d 373, 375-76 (8th Cir. 1997). Second, the issue was squarely presented by the original fee award but was not raised in the EEOC's first appeal, and the Eighth Circuit "bar[s] parties from litigating issues in a second appeal following remand that could have been presented in the first appeal." *Macheca Transp. Co. v. Phila. Indem. Ins. Co.*, 737 F.3d 1188, 1194 (8th Cir. 2013). Accordingly, the Eighth Circuit would not have considered the new argument that the EEOC advances in this Court for the first time in this eight-year-old case. That makes it particularly inappropriate to excuse the EEOC's waiver now.

III. The EEOC's Newly Invented Argument Is Wrong On Both The Facts And The Law.

The argument that the EEOC now presses in this Court for the first time is not just waived; it is wrong. The district court's dismissal of the claims at issue plainly precluded further litigation by the EEOC. And the court was fully justified in dismissing these claims with prejudice. But in any event, it is hardly clear that *only* a dismissal with prejudice can confer prevailing-party status on a defendant.

A. The District Court Dismissed The 67 Claims At Issue With Prejudice.

The district court's two judgments in this case unambiguously precluded further litigation of the EEOC's claims. After disposing of the 67 claims at issue here, which were the last remaining in the case, the court dismissed the EEOC's complaint in its entirety; desig-

nated CRST the "prevailing party"; and entered judgment for CRST. Pet. App. 216a-217a; Docket entry 279, at 1 ("Plaintiff [EEOC] takes nothing and this action is dismissed."). There should be no doubt that this disposition—which was the culmination of years of litigation that included many summary judgment decisions—precluded further litigation of the cause of action asserted in the EEOC's complaint. *See, e.g., Nevada v. United States*, 463 U.S. 110, 130-33 (1983). If there were any doubt, however, it was surely dispelled by the judgment entered after remand—to which both parties consented—expressly ordering that "this *case* is DISMISSED WITH PREJUDICE." JA 118a (emphasis added).[2] Although the judgments speak for themselves, the events surrounding them underscore that they were meant to preclude further litigation of these claims.

1. Because the EEOC's complaint did not plead separate counts for the 154 individual claims it litigated in this case, each time the district court granted summary judgment and dismissed claims, it ordered that

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[2] If the EEOC had actually believed that this second judgment violated the "mandate rule," *cf.* Resp. Br. 43-44, it plainly would not have stipulated to it. But there was no violation of the Eighth Circuit's mandate because the second judgment expressly included the dismissal of these 67 claims that the Eighth Circuit had affirmed. In any event, such a violation would only provide a basis for correction on appeal; it would not render the judgment void. The EEOC's alternative argument that the 67 claims were no longer part of the "case" is also mistaken. These claims were never severed, and in fact the judgment was expressly predicated on the prior disposition of "all other claims asserted by EEOC." JA 118a; *see* Docket entry 379, at 1 (joint motion).

"[t]he EEOC is BARRED from seeking relief in this action on behalf of" the relevant individuals. JA 311a; *see, e.g., id.* at 204a, 221a. These "barrings" were clearly preclusive of further litigation by the EEOC. Indeed, when the same ground applied both to individual interveners and to the EEOC's pursuit of some of its claims, the interveners were "DISMISSED WITH PREJUDICE," and the EEOC was "BARRED" from seeking relief on behalf of the relevant claimants. *E.g., id.* at 273a, 311a.

2. After the district court ruled that the EEOC had never had even *prima facie* evidence of a class-wide pattern or practice, CRST sought to dismiss the EEOC's remaining allegations for failure to satisfy the pre-suit requirements. In essence, CRST argued that the EEOC had unfairly brought hundreds of individual, fact-bound claims in the guise of a "'class of similarly situated female employees.'" Docket entry 222-2, at 4. Because there was never a reasonable basis for any class-wide theory of liability, the EEOC had essentially used that theory as a pretext to bypass the pre-suit requirements as to all but two of its myriad individual allegations. On this basis, CRST "ask[ed] that the case be dismissed," and that "as far as the EEOC is concerned, ... it be dismissed with prejudice." Docket entry 254, at 30-31.

After holding an evidentiary hearing, the district court fully embraced CRST's position. As the court explained, it was presented with an "exceptionally rare" case in which the EEOC had "wholly abandoned its statutory duties." Pet. App. 204a. The court went on to describe as "prophetic" concerns that such lapses

could "'equate to more frivolous suits reaching the courts'" and "'increase[] the time and expense of discovery and trials.'" *Id.* at 210a n.23. As the district judge remarked, she had "been in the business a long time," but she had "never had a case brought by a government agency that was such a mess." Docket entry 254, at 16-17.

The court therefore "BAR[RED]" the EEOC from pursuing its allegations on behalf of the remaining claimants—just as it did when dismissing an intervener's claim with prejudice. Pet. App. 215a. The court explained that it "might have stayed the instant action for further conciliation in lieu of dismissal" if the EEOC had not "wholly abdicated its role in the administrative process." *Id.* at 213a n.24. But in this case, it concluded, "dismissal is a severe but appropriate remedy." *Id.* at 214a. As the court explained: "Although dozens of potentially meritorious sexual harassment claims may now never see the inside of a courtroom, to rule to the contrary would work a greater evil insofar as it would permit the EEOC to perfect an end-run around Title VII's 'integrated, multistep enforcement procedure.'" *Id.*[3] In short, the court concluded that through its

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[3] Notably, the EEOC has completely reversed its interpretation of this statement. In this Court, the EEOC stresses the word "*may*." Resp. Br. 40. But in its original appeal, it took exactly the opposite position, and actually replaced the word "may" with an ellipsis. *See* EEOC C.A. Br., 10-1682, at 66-67 ("The court recognized dismissal as a 'severe' remedy and *acknowledged it would* result in 'dozens of potentially meritorious sexual harassment claims . . . never see[ing] the inside of a courtroom.'" (alterations in original; emphasis added)). This contradiction is not explained or even acknowledged in the EEOC's brief. However, it is clear that the

statutory abdication the EEOC had forfeited its right to litigate its claims against CRST. And, as the stipulated judgment that the EEOC co-sponsored demonstrates, the EEOC has, until now, always acknowledged that fact.

3. Thus, in its first appeal, the EEOC argued that "[t]he court erred in *preventing EEOC from seeking relief* for multiple victims of discrimination," thereby "permitting rampant sexual harassment to go unremedied." EEOC C.A. Br., 10-1682, at 63, 67 (emphasis added). Such statements are inexplicable if the EEOC thought it could simply start over.

The EEOC's motion to reopen the district court's judgment after this Court's decision in *Mach Mining, LLC v. EEOC*, 135 S. Ct. 1645 (2015), is also revealing. Seeking relief under Rule 60(b)(6), the EEOC argued that the judgment should be vacated because "EEOC *has not been able* to obtain a determination on the merits of [its] claims from a jury." Docket entry 414-1, at 10 (emphasis added); *see id.* at 13 (similar). Under the EEOC's new theory, that representation to the district court was flatly wrong; the EEOC could have immediately opened investigations, found reasonable cause, and offered to conciliate. It simply chose—for

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court used the word "may" simply to signify that, although the EEOC's action was permanently barred, the decision did not address whether *individuals* could bring suit in their own names, as several had through intervention. *See* Pet. App. 194a n.18.

unexplained reasons—to abandon its "trial-ready claims." Resp. Br. 14.[4]

It appears that, finding the Eighth Circuit's "on the merits" holding indefensible but unwilling to concede that the Eighth Circuit's decision cannot stand, the EEOC has chosen to engage in revisionist history—contending that the dismissal of these 67 claims, which it vehemently opposed in the district court, appealed unsuccessfully in the Eighth Circuit, and then recently sought to vacate, was merely a procedural inconvenience. The record makes perfectly clear, however, that the court's judgment barred further litigation of the EEOC's claims.

B. The District Court Was Fully Justified In Dismissing The EEOC's Claims With Prejudice.

Because the district court dismissed the EEOC's claims with prejudice, the EEOC's argument ultimately depends on the notion that the court was somehow legally incapable of doing so. Again, because that argument has been waived, this Court should not consider it. But it, too, is mistaken.

1. A dismissal with prejudice has long been accepted as a permissible remedy when a plaintiff's failure to satisfy a condition precedent is its own fault and per-

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[4] It is also telling that the EEOC withdrew its notice of appeal from the denial of its Rule 60 motion only one day before filing its brief in this Court. *See* Docket entry 446. One might infer that the EEOC appreciates that its old and new positions are irreconcilable.

mitting a new lawsuit would be unfair. Indeed, the very authorities cited by the EEOC make this clear. *See* 18A Charles Alan Wright et al., *Federal Practice & Procedure* § 4437, at 185 (2d ed. 2002) (noting that "special circumstances may make it manifestly unfair to permit a second action after satisfying a precondition that easily could have been satisfied at the time of the prior action" (internal quotation marks omitted)); *Restatement (Second) of Judgments* § 20 cmt. n, at 177 (1982).

Here, the decision to dismiss with prejudice was justified by the fact that the EEOC "wholly abdicated its role in the administrative process." Pet. App. 213a n.24. As the district court recognized, Congress made that process a *pre-suit* requirement in order to shield employers from the costs of avoidable or unwarranted litigation. Accordingly, it would have made little sense to dismiss without prejudice in this case; the EEOC's actions had already "foreclosed any possibility that the parties might settle all or some of this dispute *without the expense of a federal lawsuit.*" *Id.* at 211a (emphasis added). The EEOC could not be permitted to "cure" its abdication merely by starting over again, leaving CRST with millions of dollars of fees and expenses accrued over years of unwarranted litigation.[5] Thus, as

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[5] As the district court explained, the EEOC's argument that CRST was to blame for these costs because it did not raise the alarm sooner "is without merit." JA 154a. CRST moved to strike many of the EEOC's claims at the outset of the case on the basis that EEOC could not have investigated them or made reasonable-cause findings. *Id.* The court denied that motion in reliance on the EEOC's "represent[ation] that 'it had a good faith belief that each and every one . . . ha[d] an actionable claim for sex discrimina-

the district court concluded, allowing further litigation—at least by the EEOC—would have "ratif[ied] a 'sue first, ask questions later' litigation strategy." *Id.* at 214a. In cases of this kind, a dismissal with prejudice is an appropriate response. *See, e.g., Stebbins v. Nationwide Mut. Ins. Co.*, 528 F.2d 934, 937-38 (4th Cir. 1975); *Weissinger v. United States*, 423 F.2d 795, 798 (5th Cir. 1970) (en banc).[6]

2. For the same reason, the EEOC's reliance on *Costello v. United States*, 365 U.S. 265 (1961), is misplaced. *Costello* reasoned that whether a particular kind of dismissal "operates as an adjudication on the merits," Fed. R. Civ. P. 41(b), should depend on whether "the policy" of Rule 41(b) applies. 365 U.S. at 286. Failure to file an affidavit of good cause in a denaturalization proceeding, the Court explained, does not implicate that policy because "[t]he defendant is not put to the necessity of preparing a defense." *Id.* at 287. In

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tion.'" *Id.* However, the court cautioned the EEOC that if its representation turned out to be false, as it did, CRST could seek relief. Thus, CRST did not sleep on its rights; rather, both CRST and the court were misled at the outset.

[6] The EEOC's discredited argument (Resp. Br. 7-8) that its investigation was hampered by CRST's failure to provide all information that the EEOC requested was long ago correctly rejected by the district court after an evidentiary hearing on CRST's motion that these 67 claims be dismissed. The court found CRST had responded fully to EEOC's information requests. Pet. App. 167a-180a; *see* Docket entry 153, at 14 (rejecting the EEOC's argument regarding timing of discovery). Although the EEOC renewed its contention on appeal, the Eighth Circuit found no basis for blaming CRST for the narrow scope of the EEOC's investigation. Pet. App. 105a-113a.

this case, by contrast, CRST *was* required to "incur the inconvenience of preparing to meet the merits," *id.* at 286, by deposing 154 claimants and filing several summary judgment motions. *Costello* is therefore entirely consistent with the rule that a court may decide to dismiss with prejudice in cases like this one.[7] Indeed, *Costello* noted that the district court in that case had declined to address the prejudice question, *id.*, whereas the court in this case made a decision to dismiss with prejudice based on the very circumstances credited in *Costello*.

Accordingly, the district court acted well within its authority in dismissing the EEOC's claims with prejudice.

C. The Court Should Not Adopt The EEOC's Position That Only A Dismissal With Prejudice Confers "Prevailing Party" Status.

Because the EEOC's "dismissal without prejudice" argument is both waived and mistaken, the Court need not address the EEOC's assertion that a dismissal without prejudice "obviously" would not suffice to make a defendant a prevailing party. Resp. Br. 27. In fact, however, the lower courts are divided on this question, with several rejecting the EEOC's position.[8]

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[7] *Hallstrom v. Tillamook Cty.*, 493 U.S. 20 (1989), is inapposite for similar reasons; there was no allegation that the plaintiff abused the statutory process or that further litigation would be unfair.

[8] *See, e.g., Estate of Hevia v. Portrio Corp.*, 602 F.3d 34, 46 (1st Cir. 2010); *In re Paoli R.R. Yard PCB Litig.*, 221 F.3d 449, 471 n.10 (3d Cir. 2000); *Cantrell v. Int'l Bhd. of Elec. Workers*, 69 F.3d 456, 458

Were the Court to address this issue, it should not hold that a defendant can only "prevail" when it secures a dismissal with prejudice.

As this Court has explained, "prevailing party" is a "legal term of art" that refers, in its paradigm case, to "'[a] party in whose favor a judgment is rendered.'" *Buckhannon*, 532 U.S. at 603. And a judgment dismissing a case "without prejudice" is nonetheless a final judgment that resolves that case in favor of the defendant. *See United States v. Wallace & Tiernan Co.*, 336 U.S. 793, 794 n.1 (1949); *Ciralsky v. CIA*, 355 F.3d 661, 666-67 (D.C. Cir. 2004) (collecting cases). Accordingly, it would be perfectly logical to hold that a defendant prevails in an "action or proceeding," 42 U.S.C. § 2000e-5(k), by securing a final judgment disposing of the case and affording the plaintiff no relief. Moreover, the statutory policy of awarding fees in appropriate circumstances to a prevailing defendant may require such an award even when a plaintiff is not barred from refiling its claims. For these reasons, the Court should not lightly adopt the EEOC's newly fashioned contention that *only* a dismissal of a case with prejudice can support "prevailing defendant" status.

IV. The District Court Did Not Abuse Its Discretion In Awarding Fees.

In its final gambit to avoid a loss on the question presented, the EEOC urges this Court to affirm on a ground the EEOC acknowledges the court of appeals never reached—that the district court abused its

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(10th Cir. 1995) (en banc); *see also J.G.T., Inc. v. Ashbritt, Inc.*, 459 F. App'x 333, 334 (5th Cir. 2012) (applying state law).

discretion in finding that the EEOC's failure to fulfill its statutory obligations rendered its lawsuit "frivolous, unreasonable, or groundless" under *Christiansburg*. Resp. Br. 49. But the district court properly exercised its broad discretion in finding that standard satisfied here. The court's fee award was based on its extensive first-hand knowledge of how the parties litigated this case, and there is no reason to overturn its considered judgment. Nor, after a "'second major litigation'" over fees extending now to four years, should CRST be required to further litigate this issue. *See Fox v. Vice*, 131 S. Ct. 2205, 2216 (2011).

The district court found that the EEOC's actions were "unreasonable" because they were "contrary to the procedure outlined by Title VII and imposed an unnecessary burden upon CRST and the court." Pet. App. 64a; *accord* JA 143a.[9] Indeed, as recounted above, *supra* at 10-12, the court expressed dismay that any "government agency" would make "such a mess" of a case. *Cf. Christiansburg*, 434 U.S. at 422 n.20 (inviting district courts to "consider distinctions between the Commission and private plaintiffs"). The court was entirely correct to find that the EEOC's "end-run around Title VII's statutory prerequisites" rendered the ensuing lawsuit unreasonable. JA 142a.

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[9] The EEOC has conceded that it did not investigate, find reasonable cause for, or attempt to conciliate 152 of its 154 individual claims. JA 100a-101a. Thus, although CRST won summary judgment with respect to 80 of those claims, it should never have been required to litigate them.

The crux of the EEOC's response, which was rejected by both the district court and the Eighth Circuit, is that its failure to fulfill the pre-suit requirements for these 67 claims cannot have been unreasonable because the EEOC regularly brings claims on behalf of a class "that include[s] individuals who have not yet been identified when the suit is brought." Resp. Br. 50. But while the EEOC certainly may bring claims on behalf of classes that include unidentified individuals, it cannot do so when the "class" is simply a placeholder for an open-ended set of unrelated individuals with particularized grievances. If such "class" claims were permitted, the pre-suit investigation, reasonable-cause, and conciliation requirements would be meaningless.

Accordingly, although the EEOC may pursue class claims, it must first investigate, find reasonable cause, and conciliate with respect to the *specific discriminatory practices* that are alleged to affect, and thereby delimit, the class. The EEOC has long understood this requirement. *See* EEOC Br. in *General Telephone Co. of the Northwest v. EEOC*, 446 U.S. 318, *available at* 1980 WL 339554, at *12-13. The EEOC never did that in this case. Instead, the EEOC used a single charge of discrimination involving highly individualized facts as a springboard from which to litigate on behalf of an unbounded "class of similarly situated female employees." JA 792a-793a. As quickly became clear, the EEOC's understanding of "similarly situated" encompassed *any* allegation of sexual harassment based on any set of facts and any legal theory, when there was no evidence of any common pattern or practice affecting all members of the class.

Tellingly, the EEOC did not even allege a common pattern-or-practice claim in its complaint. Nor did the EEOC attempt to conciliate on behalf of a class defined by any common practice; rather, it explicitly informed CRST that it was "not able to provide" even "an indication of the size of the class." JA 282a. The district court then specifically found that there was no common pattern or practice tying the EEOC's disparate individual claims together, holding there was "nothing in the record which a reasonable jury might cobble together to show . . . a pattern or practice of tolerating sexual harassment instead of merely isolated or sporadic failures." JA 435a. The EEOC thus never investigated or found reasonable cause as to any class-wide discriminatory practice during the course of its investigation, nor attempted conciliation on behalf of a class.

That is what distinguishes this case from those on which the EEOC relies. *Mach Mining*, unlike this case, was about a common discriminatory practice allegedly affecting an identifiable class. There, the EEOC brought a pattern-or-practice claim under Section 707 after investigating and finding reasonable cause to believe the employer had discriminated against a class of women who—like the charging party—had applied for mining jobs and been denied because the employer's hiring system was based exclusively on referrals from existing employees. *Mach Mining* JA at 15, 22-23, *available at* 2014 WL 4380915. The class of potential claimants on whose behalf the EEOC sued was therefore easily ascertainable—it consisted of every woman

who applied for and was denied a position while the alleged discriminatory practice was in effect.

Similarly, in *General Telephone*, the EEOC brought suit only after investigating and finding reasonable cause to believe that the employer used discriminatory maternity-leave policies and discriminated in its assignments of women to jobs and managerial positions. In allowing the EEOC to move forward with a class claim, the *General Telephone* Court stressed that although "EEOC enforcement actions are not limited to the claims presented by the charging parties," they are limited to those "violations that the EEOC ascertains in the course of a reasonable investigation of the charging party's complaint." 446 U.S. at 331. In other words, where the EEOC investigates and finds reasonable cause to believe the employer has engaged in a discriminatory practice affecting a class, the EEOC should attempt conciliation as to that practice and the identifiable class it affects and bring suit on behalf of the class if those conciliation attempts fail.

While the EEOC feigns surprise at this rule, it has been the settled law applied by this Court and the courts of appeals for decades. *See, e.g., EEOC v. Harvey L. Walner & Assocs.*, 91 F.3d 963, 968 (7th Cir. 1996); *EEOC v. Farmer Bros. Co.*, 31 F.3d 891, 899 (9th Cir. 1994); *EEOC v. Delight Wholesale Co.*, 973 F.2d 664, 668 (8th Cir. 1992); *EEOC v. Gen. Elec. Co.*, 532 F.2d 359, 364-65 (4th Cir. 1976).[10] And there is good reason for such a rule. "'The relatedness of the initial

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[10] Each of the cases cited by the EEOC in note 15 of its Response Brief applies this same rule.

charge, the EEOC's investigation and conciliation efforts, and the allegations in the complaint is necessary to provide the defendant-employer adequate notice of the charges against it and a genuine opportunity to resolve all charges through conciliation.'" Pet. App. 110a.[11]

It is undisputed that the EEOC never identified the alleged discriminatory practices at issue in these 67 highly individualized cases during the course of its investigation, that it never made a reasonable-cause determination as to any common discriminatory practice, and that it never attempted to conciliate with CRST over any alleged common discriminatory practice. Nonetheless, after CRST challenged the basis for the EEOC's identification of hundreds of individual claims and the district court allowed the case to proceed based on the EEOC's representation that it had valid grounds for each of its claims, the EEOC required CRST to litigate 153 individual claims that were ultimately dismissed, including these 67 claims. But as this Court unanimously held in *Mach Mining*, before it can bring suit, the EEOC "must inform the employer about the specific allegation" against the employer by "describ[ing] both what the employer has done and

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[11] That one court of appeals judge adopted the EEOC's "class" argument cannot establish that the position was objectively reasonable or that the Eighth Circuit's contrary holding broke new ground. *See, e.g., Chaidez v. United States*, 133 S. Ct. 1103, 1110-11 & n.11 (2013) ("Dissents have been known to exaggerate the novelty of majority opinions; and 'the mere existence of a dissent' . . . does not establish that a rule" was not "'apparent to all reasonable jurists'").

which employees (or what class of employees) have suffered as a result." 135 S. Ct. at 1655-56. That requirement to "describe[] . . . *what* class of employees" is involved cannot possibly be met simply by asserting a completely undefined and unbounded "class of employees and prospective employees," JA 811a, as the EEOC did here.

The district court, which had overseen this case for years, thus acted well within its discretion when it found that the EEOC had unreasonably short-circuited the statutory process, to the manifest detriment of all involved, and that a fee award was therefore warranted under *Christiansburg*. Substantial deference is due to this determination. *Fox*, 131 S. Ct. at 2216.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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March 10, 2016